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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Environmental Control Systems,)	Docket No. I. F. & R.-III-432-C
Inc.,)	
)	
Respondent)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT
ORDER AND RENDERING SUA SPONTE PARTIAL
ACCELERATED DECISION AS TO LIABILITY

Complainant, U.S. Environmental Protection Agency ("EPA"), has moved for a default order pursuant to 40 C.F.R. § 22.17 against Respondent, Environmental Control Systems, Inc. (ECS), for failure to file a pre-hearing exchange as directed by the orders of ALJ, dated December 13, 1991, and February 12, 1992. For reasons discussed below, I deny the Complainant's Motion for Default Order, and sua sponte render a partial accelerated decision as to liability. The amount of the penalty remains at issue and will be determined by a hearing, if necessary.

The complaint, issued on July 18, 1991, charged Respondent, ECS, with failure to file a 1990 annual pesticide production report

as required by Section 7(c)(1) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136e(c)(1)^{1/} and the applicable regulations, 40 C.F.R. §§ 167.3 and 167.85. Section 167.85(d) provides that an annual report for the preceding calendar year is to be submitted on or before March 1 of each calendar year, even if the producer has produced no pesticide product for that reporting year. The proposed penalty of \$4000 was allegedly calculated in accordance with the "Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)," dated July 2, 1990, and the "Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement," dated February 10, 1986.

Responding to the complaint, ECS, acting pro se, submitted a letter, dated September 16, 1991, admitting its failure to file a

^{1/} Section 7(c)(1) of FIFRA provides:

(1) Any producer operating an establishment registered under this section shall inform the Administrator within 30 days after it is registered of the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides-

(A) which the producer is currently producing;

(B) which the producer has produced during the past year; and

(C) which the producer has sold or distributed during the past year.

The information required by this paragraph shall be kept current and submitted to the Administrator annually as required under such regulations as the Administrator may prescribe.

1990 pesticide report.^{2/} Although the letter does not reflect that it contains any enclosures, Complainant states that a completed 1990 pesticide production report was included with the answer (pre-hearing exchange at 4). ECS alleged that it had ceased to produce any pesticides, and had been under the impression that it was no longer required to submit an annual report. The letter stated that ". . . because we did not pay for the maintenance fee we were to pay at the end of 1989, [w]e lost our basic registration numbers that we had on our products and . . . stopped selling them." The nature of the "maintenance fee" referred to in Respondent's letter, and how the failure to pay such a fee resulted in the loss of its registration number, was not made clear.^{3/}

On December 13, 1991, the ALJ directed the parties to file pre-hearing exchanges on or before February 28, 1992. As part of its pre-hearing exchange, Respondent was requested to:

^{2/} Although this letter does not expressly contradict or dispute any allegations of the complaint, it was interpreted as a request for hearing by the Regional Hearing Clerk and forwarded to the Chief ALJ for assignment of an ALJ pursuant to 40 C.F.R. § 22.21. It is noted, however, that the paragraph of the complaint entitled "Notice of Opportunity To Request A Hearing" provides in pertinent part that "(t)he denial of any material fact or the raising of any affirmative defense shall be construed as a request for a hearing." Liberally interpreted, the letter may be regarded as contesting the amount of the penalty.

^{3/} Complainant's pre-hearing exchange, states in pertinent part at 4 that "Respondent's non-payment of product registration maintenance fees and the resultant product registration cancellations has [sic] no direct bearing on the establishment registration and Respondent's obligation to file annual pesticide production reports." This is because having a product registration is not a prerequisite to obtaining an establishment registration.

- (1) State when Complaint was received.^{4/}
- (2) Identify pesticide products the registrations of which were apparently canceled for nonpayment of fees. State when these products were registered by Respondent and whether prior pesticide production reports have been timely filed.
- (3) If Respondent is contending proposed penalty exceeds its ability to pay, furnish financial statements or other data to support such contention.

Complainant filed its pre-hearing exchange on May 29, 1992, within the time, allowed by the ALJ, as extended. ECS did not respond to the ALJ's order for a pre-hearing exchange.

On July 21, 1992, Complainant filed a Motion for Default Order pursuant to the Consolidated Rules of Practice, 40 C.F.R. § 22.17, for failure to comply with the order for filing a pre-hearing exchange.^{5/} On August 14, 1992, ECS, still acting pro se, served a timely response to the Motion for Default Order. Respondent again acknowledged that it failed to file a 1990 pesticides report, but asked that the EPA "please reconsider your proposed fine against us. Any fine at this time would be a very harmful blow to our company." To support its contentions of inability to pay the proposed fine, Respondent submitted a copy of the first page of its

^{4/} This is because there was a question as to whether the answer was filed within the 20-day period required by the Rules of Practice, 40 C.F.R. § 22.15. Complainant says that ECS received the complaint on July 30, 1991, as evidenced by a receipt for a certified mail, and asserts that the answer was not timely filed (Pre-hearing exchange at 5). Complainant has not moved for default on this basis, however, treating the untimely answer as further evidence of ECS's disregard of its regulatory obligations.

^{5/} 40 C.F.R. § 22.17(a) states: "A party may be found to be in default . . . upon failure to comply with a prehearing or hearing order of the Presiding Officer."

1991 U.S. Corporation Income Tax Return. This return shows gross receipts of \$245,842, gross profits of \$147,738 and deductions (expenses) totaling \$191,718 for a net loss of \$43,704. Additionally, ECS stated that "our sales have continued to slip, and we are presently running at a rate of \$146,000.00 for total sales for 1992."

D I S C U S S I O N

The complaint alleges that ECS failed to submit an annual pesticide production report for the calendar year 1990 by March 1, 1991. ECS has admitted this allegation expressly and by necessary implication by enclosing its report for 1990 with its letter-answer to the complaint, dated September 16, 1991.

Complainant's motion for default is based on the failure of ECS to file pre-hearing exchange information as ordered by the ALJ. ECS was directed to furnish a statement of when the complaint was received, identification of pesticide products whose registrations were canceled for non-payment of fees, the date these products were registered, whether prior pesticide production reports have been timely filed and financial information, if ECS was contesting the proposed penalty, upon the ground it exceeds ECS's ability to pay.

Complainant's pre-hearing exchange states that ECS received the complaint on July 16, 1991, as evidenced by a receipt for certified mail.

Although pesticides involved in the cancellations for non-payment of fees have not been identified, establishment

registration is not dependent on product registration (supra note 3). Complainant alleges that ECS has established a history of lateness in submitting production reports (Pre-hearing exchange at 4, 5). ECS hasn't denied or explained this allegation except to state in response to the motion for a default order that "(w)e are grossly understaffed."

As indicated previously, ECS submitted a copy of the first page of its corporate income tax return for the year 1991 with its response to the motion for default. The response indicates that ECS's tax return for 1991 was only recently completed, the copy reflecting that it was signed by Mr. Bonarrigo, President of ECS, on August 3, 1992. ECS emphasized that ". . . our sales were much lower than we had originally anticipated."

The foregoing factual recitation establishes that information requested of ECS has been partially supplied by Complainant and that ECS has furnished a copy of a portion of its 1991 income tax return in support of its contention that imposition of the penalty sought would adversely effect its ability to continue in business. Although further financial data, e.g., a current profit and loss statement, a current balance sheet and income tax returns for two or three prior years, would be desirable to fully assess this defense, ECS is considered to have substantially cured its default.

The general rule both in federal courts and administratively is that default judgments are not favored and that cases should be decided on their merits whenever possible. See, e.g., Eitel v. McCool, 782 F.2d 1470, 1472 (9th Cir. 1986) and Wilson v. Winstead,

84 F.R.D. 218, 219 (E.D. Tenn. 1979). See also In the Matter of Sangamo Weston, Inc., Docket No. 89-35-R (Order Denying Respondent's Motion for Default Order, May 10, 1990), In The Matter of Columbia Falls Aluminum Company, Docket No. TSCA-(PCB)-VIII-91-02 (Order Denying Complainant's Motion for Default, etc., March 31, 1992) and In the Matter of Certified Oil Company, Docket No. RUST-006-1991 (Order Denying Motion for Default Judgment and Setting Further Procedures, April 13, 1993). Moreover, it is clear that the mere fact a party may be in default does not entitle the opposing party to a default judgment or order as a matter of right. Columbia Falls Aluminum Company, supra. It follows that a finding of default is discretionary with the ALJ. Under the circumstances, including the fact that ECS has substantially cured its default and is not represented by counsel,^{6/} the motion for a default will be denied.

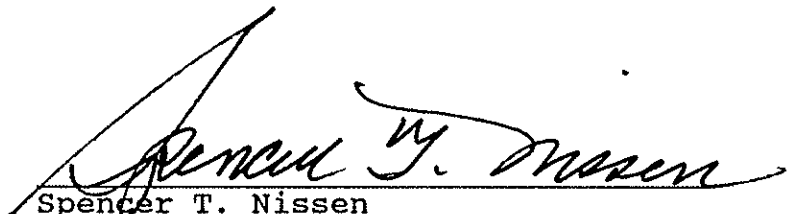
There being no dispute but that ECS failed to file the 1990 pesticide production report in a timely manner, I will, as permitted by Rule 22.20 (40 CFR Part 22) sua sponte, render a partial accelerated decision, finding that ECS violated the Act and regulation as alleged in the complaint and is liable for a civil penalty in accordance with Section 14(a)(1) of FIFRA. The amount of the penalty remains at issue and will be determined by a hearing, if necessary.

^{6/} Although the fact that a firm is not represented by counsel does not excuse non-compliance with the Rules of Practice or orders of the ALJ, it is nevertheless a factor in determining how strictly rules or orders are to be applied.

O R D E R

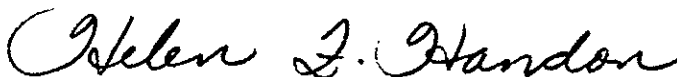
Complainant's motion for a default order is denied. ECS is found to have violated the Act and regulation as alleged in the complaint and is liable for a civil penalty in accordance with Section 14(a)(1) of the Act. The amount of the penalty remains at issue.

Dated this 13th day of July 1993.


Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT ORDER AND RENDERING SUA SPONTE PARTIAL ACCELERATED DECISION AS TO LIABILITY, dated July 13, 1993, in re: Environmental Control Systems, Inc., Dkt. No. IF&R-III-432-C, was mailed to the Regional Hearing Clerk, Reg. III, and a copy was mailed to Respondent and Complainant (see list of addressees).



Helen F. Handon
Legal Staff Assistant

DATE: July 13, 1993

ADDRESSEES:

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